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No. 84-1076

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Appellant,

v.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC., *et al.*,
Appellees.

On Appeal from the Supreme Court of Mississippi

BRIEF AMICUS CURIAE OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF APPELLANT

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ASSOCIATED GAS DISTRIBUTORS
MEMBER COMPANIES

Atlanta Gas Light Co.
Baltimore Gas & Electric Co.
Bay State Gas Co.
The Berkshire Gas Co.
Boston Gas Co.
The Brooklyn Union Gas Co.
Central Hudson Gas & Electric Corp.
Chesapeake Utilities Corp.
City of Holyoke, Mass., Gas & Electric Dept.
City of Norwich, Dept. of Public Utilities
City of Westfield Gas & Electric Light Dept.
Colonial Gas Co.
Commonwealth Gas Co.
Concord Natural Gas Corp.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Co.
Elizabethtown Gas Co.
EnergyNorth, Inc.
Essex County Gas Co.
Fitchburg Gas & Electric Light Co.
Lynchburg Gas Co.
New Jersey Natural Gas Co.
New York State Electric & Gas Corp.
North Carolina Natural Gas Corp.
Northeast Georgia Municipal Gas Utilities
Northeast Utilities
Northern Utilities, Inc.
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Philadelphia Gas Works
Providence Gas Co.
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Co.
South County Gas Co.
South Jersey Gas Co.
The Southern Connecticut Gas Co.
UGI Corporation
Valley Gas Co.
Washington Gas Light Co.

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BRIEF AMICUS CURIAE OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD) is an unincorporated group whose members (listed on the inside cover of this brief) are gas distribution companies located along the eastern seaboard of the United States from New England through Georgia. Together, the forty companies known as AGD serve over eleven million customers; their annual sales comprise approximately 25 percent of the gas sold through the nation's interstate gas supply network.

Each AGD company purchases its natural gas for resale from one or more of the major, regulated interstate

gas pipeline companies, including the Transcontinental Gas Pipe Line Corporation (Transco), Appellant in this proceeding. A number of AGD members purchase a substantial portion of their gas supply from Transco; these AGD companies are directly affected by any increase in Transco's rates.

The purpose of the present brief *amicus curiae* is twofold. First, AGD seeks to underscore the historical and continuous federal preemption of the regulation of interstate gas pipeline companies. In particular, we note that at this moment there exists an imminent possibility of collision between the Mississippi ratable take rule enforced against Appellant, Transco, and a ruling sought in a proceeding at the Federal Energy Regulatory Commission (FERC or Commission), which is investigating Transco's purchasing practices.

Second, AGD writes to apprise the Court of the critical nature of this issue for consumers of natural gas nationwide who depend upon a comprehensive federal system of regulation of our nation's interstate gas pipeline network. As other states, particularly the larger gas-producing states, begin to enact and/or enforce "ratable take" schemes against interstate pipelines, the consequences for the ultimate consumers, who absorb the increased costs and uncertainties resulting therefrom, may be severe. As public utilities, the members of AGD have an obligation to protect their customers against the payment of excessive and unlawful natural gas prices. Therefore, AGD has a substantial and direct interest in the outcome of this appeal. For this reason, AGD submits this brief *amicus curiae* in support of the Appellant.

CONSENT OF THE PARTIES

AGD has obtained the written consent of the parties to this appeal for its filing of the present brief *amicus curiae*. The consent statements are attached to the original signed copy hereof filed with the Court.

SUMMARY OF ARGUMENT

I. Pursuant to the Natural Gas Act (NGA), specifically Sections 1(b), 4, 5, and 7, the FERC has comprehensive authority to oversee and regulate the purchasing practices of the nation's interstate gas pipelines. In *Northern Natural*, this Court found that that authority preempted state attempts to regulate interstate pipelines by means of "ratable take" laws, such as the Mississippi law at issue here. The subsequent passage of the NGPA, with its gradual scheme of wellhead *price* deregulation, did not affect the FERC's *pipeline* regulatory authority. The regulation of interstate pipeline purchasing practices remains preempted by federal law. Thus, the Mississippi Supreme Court's holding that a state may regulate an interstate pipeline's purchases of NGPA-deregulated gas is erroneous.

The FERC's continuous assertion of regulatory authority over pipeline purchasing practices demonstrates that the NGPA did not affect a withdrawal of federal pipeline regulation. Indeed, the FERC is currently conducting an investigation of the purchasing practices of Appellant Transco—including its purchases of Mississippi gas pursuant to the Oil & Gas Board's order. The outcome of this investigation could be a federal ruling which directly conflicts with the Mississippi law. The enforcement of state ratable take laws, therefore, runs a collision course with federal action.

II. The need for a comprehensive federal system of pipeline regulation is clear given the oppressive consequences which would inevitably result from diverse, conflicting state regulation. These consequences would affect the entire gas industry, as well as the gas-consuming public.

The pipelines would suffer enormous and costly administrative burdens by having to juggle their gas supplies from all producers operating in a common source,

and in some cases from the whole state. Importantly, various producing states have different ratable take schemes. Compliance with several different states' laws at one time may well be impossible.

Finally, given a complex and conflicting web of state regulations, the FERC would be unable to carry out its most fundamental responsibility—the protection of the nation's gas consumers against excessive rates and charges. Unlike the federal agency, state regulatory bodies are charged with promoting the state, not federal, interests. Thus, the interests of out-of-state gas consumers would be ignored by producing state regulators. The federal government's interest in comprehensive, nationwide pipeline regulation, therefore, is continuous and compelling.

ARGUMENT

I. THE REGULATION OF INTERSTATE GAS PIPELINE PURCHASING PRACTICES HAS BEEN PREEMPTED BY FEDERAL LAW.

A. The Federal Energy Regulatory Commission's Responsibility To Regulate Interstate Pipelines, Mandated By The Natural Gas Act, Remains Unaffected By Passage Of The NGPA.

In *Transcontinental Gas Pipe Line Corporation v. The State Oil & Gas Board of Mississippi and Coastal Exploration, Inc., et al.*, 457 So.2d 1298 (Miss. 1984), the Mississippi Supreme Court recognized, correctly, that "[u]ntil 1978 the federal sovereign indisputably had preempted all state regulation of wellhead sales of natural gas." *Id.* at 1304. The court below erred, however, in holding that Congress' passage of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.* (1982) (NGPA), lessened the preemptive authority of the federal government, acting through the Federal Energy Regulatory Commission (FERC or Commission), to regulate the purchasing practices of interstate gas pipelines. The

NGPA's gradual scheme of deregulation of first sale or "wellhead" prices of gas limited the FERC's jurisdiction over gas *producers*, but does not provide an entree to the states to begin regulating interstate *pipelines* through so-called "ratable take" laws such as the State of Mississippi's Statewide Rule 48.

The FERC derives its comprehensive authority to oversee and regulate the purchasing practices of the nation's interstate gas pipelines from several sources in the Natural Gas Act of 1938 (NGA), 15 U.S.C. § 717 (1982).[1] The broadest basis of FERC jurisdiction over interstate pipelines is found in NGA Section 1(b). 15 U.S.C. § 717. There, the Commission is given general authority over (a) the transportation of natural gas in interstate commerce, (b) the sale in interstate commerce of natural gas for resale, and (c) companies engaged in such transportation or sale.

Several substantive provisions of the NGA specifically authorize the federal regulation of pipeline purchasing practices. Section 4 of the NGA, 15 U.S.C. § 717(c), governs pipeline rate increase proceedings. In this type

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[1] Importantly, prior to any federal regulation—or deregulation—of sales for resale, or "wholesale sales," of natural gas in interstate commerce, this Court refused to permit state regulation of interstate pipelines on the ground that it imposed a direct burden on interstate commerce in violation of the Commerce Clause of the Constitution. *See, e.g., Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924). In enacting the Natural Gas Act of 1938, 15 U.S.C. § 717 (1982), the Congressional committee reports noted that wholesale sales to interstate pipelines

> ". . . have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. *The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.*" H.R. Rep. No. 709, 75th Cong., 1st Sess. 1-2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess., 2 (1937) (citations omitted) (emphasis added).

Exxon Corp. v. Eagerton, 462 U.S. 176, 185 (1983).

of case, "interested" parties (gas producers supplying the pipeline, pipeline customers, and consumer representatives) may raise questions concerning the "justness and reasonableness" of the purchasing pattern under which that pipeline either acquired its gas supply in a past period or proposes to acquire gas in the future. The Commission may then respond to these complaints by making appropriate adjustments in the pipeline's approved cost of service.[2]

Under NGA Section 5, 15 U.S.C. § 717(d), the Commission has authority to adjudicate the justness and reasonableness of any pipeline "practice" which is reflected in the rates and charges of that pipeline. If any such practice is found to be unjust, unreasonable or unduly discriminatory, the Commission is required by Section 5 to "fix" the practice "to be thereafter observed." This section provides a basis for Commission action which could well affect a pipeline's gas purchasing practice in a manner inconsistent[3] with state ratable take schemes.

In 1963, this Court was presented with the question whether the State of Kansas had the power to force an interstate pipeline company to take ratably from all Kansas producers connected to its system. *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84 (1963). The Court first rejected the State's argument that its ratable take order was directed to the "production and gathering" of natural gas, which is exempt from federal regulation under the NGA. The Court then held the Kansas ratable take order invalid on the ground that it "invade[d] the exclusive jurisdiction

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[2] *See, e.g., Columbia Gas Transmission Corp.*, Docket Nos. TA81-1-21, *et al.*, Opinion No. 204, 26 FERC ¶ 61,034 at 61,096 (January 16, 1984).

[3] Whereas the FERC's primary obligation is to protect gas consumers against "excessive rates and charges," *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 388 (1959), the enforcement of state ratable take legislation has no such purpose.

which the Natural Gas Act has conferred upon the Federal Power Commission over the sale and transportation of natural gas in interstate commerce for resale." *Id.* at 89. The federal regulatory scheme was found to leave no room for either direct or indirect state regulation of the prices of interstate wholesale sales of gas. *Id.* at 91. More importantly, for the purpose of these proceedings, this Court stated that

> [t]he danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at purchasers who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the state, cf. *Miller Bros. Co. v. Maryland*, 347 U.S. 340—a task which would otherwise presumably be the State Commission's. Moreover, any readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. See *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 610.

Id. at 92. The language of this passage clearly indicates the Court's basis for finding that the federal regulatory scheme preempted the state order. That basis was grounded in federal regulation not simply of wellhead prices but of interstate pipeline-purchasers and their purchasing patterns, the readjustment of which could "seriously impair" the Commission's ability to regulate the pipelines' cost structures and sales to wholesale customers, i.e., distributors.

The Mississippi Supreme Court's basis for divergence from this Court's clear statement in *Northern Natural* was the 1978 passage of the NGPA. As described in the opinion below, this legislation combined an extension of federal regulation into the intrastate market for gas with a "comprehensive plan of deregulation" of federal rate-setting for wellhead prices of gas, "in order to provide producers, operators, and pipeline purchasers with the degree of freedom from regulation and the price incentives necessary to encourage discovery and production of more gas and thus alleviate the theretofor seemingly perpetual natural gas shortage." *Transcontinental Gas Pipe Line*, 457 So.2d at 1314-15. The crux of the lower court's holding was that the *Northern Natural* decision was effectively overruled when Congress withdrew the FERC's authority to regulate wellhead prices. It concluded, therefore, that the states may now impose ratable take obligations on the interstate pipelines which purchase gas within their borders.

The Mississippi court's restriction of its holding to gas which was "deregulated" by the NGPA is essentially irrelevant to the question of federal preemption. It also reflects the court's misunderstanding of the effect of the NGPA, for its statement that "the Natural Gas Act of 1938 (NGA) and FERC's jurisdiction under the act *never* apply to deregulated gas," 457 So.2d at 1316, is simply not accurate. The section of the Act cited in support of this broad assertion, Section 601(a)(1), 15 U.S.C. § 3431(a)(1), entitled "Coordination with the Natural Gas Act," states:

> (A) NATURAL GAS NOT COMMITTED OR DEDICATED * * * the provisions of the Natural Gas Act and the jurisdiction of the Commission under such shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act *solely by reason of any first sale of such natural gas.*

> (B) COMMITTED OR DEDICATED NATURAL GAS * * * for purposes of Section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply *solely by reason of any first sale of natural gas* which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act and which is—
>
> (i) High cost natural gas * * *

(Emphasis added.) The qualifying phrase "solely by reason of any first sale" indicates that the Commission does not have jurisdiction to regulate the price at which certain gas is sold into interstate commerce. It has no effect on the Commission's jurisdiction to regulate the transportation of natural gas in interstate commerce, *i.e.*, its duty to regulate the pipelines' purchasing patterns and practices. Thus, the Mississippi court's finding that federal deregulation of certain types of *gas* left room for state regulation of interstate *pipelines* is erroneous.

Ironically, the Mississippi Supreme Court itself recognized that Congress' withdrawal of federal regulation of wellhead pricing did not end the inquiry. It quoted this Court's recent statement in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission* that

> a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.

461 U.S. 375, 384 (1983) (emphasis in original). Despite this acknowledgment, the court could cite no support whatsoever for its determination that Congress intended to allow the states to exercise authority in an area where it recognized that a federal preemption problem existed.

Nor did the court acknowledge that in *Maryland v. Louisiana*, 451 U.S. 725 (1981), decided *after* the pas-

sage of the NGPA, this Court relied specifically on *Northern Natural.* In *Maryland,* the Court determined that a Louisiana "First Use" Tax on natural gas brought into the state (primarily from the Outer Continental Shelf) which was imposed upon pipelines and eventually passed through to the ultimate consumer, "like the State Commission's order in *Northern Natural,*" was "inconsistent with the federal scheme and must give way." *Id.* at 751. The Court relied heavily on *Northern Natural* for this determination, quoting the passage (excerpted above) which described the detrimental impact of the state requirement upon FERC's "authority to regulate the intricate relationship between the purchaser's cost structures and eventual costs to wholesale customers . . ." *Id.* at 750, *quoting Northern Natural,* 372 U.S. at 92.[4]

In short, the Mississippi Supreme Court erred in finding either that the federal government has withdrawn its comprehensive regulation of interstate pipelines' purchasing practices or that, to the extent it has deregulated the setting of natural gas prices, it permitted the states to enter the field of interstate pipeline regulation.

B. Enforcement Of The Mississippi Ratable Take Order Will Collide With The FERC's Exercise Of Its Pipeline Regulatory Responsibilities.

Recent proceedings at the FERC to investigate the purchasing patterns of various pipelines—under the authority of both the NGA and the NGPA—demonstrate

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[4] *See also Exxon Corp. v. Eagerton,* 462 U.S. 176 (1983), in which the Court held that an Alabama statute prohibiting passthrough of a state severance tax imposed upon gas producers was preempted by federal law, stating

> Here, as in *Maryland v. Louisiana,* the state statute "interfere[d] with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers." 451 U.S. at 749.

462 U.S. at 185.

vividly that the Commission continues to exercise its statutory responsibilities of pipeline regulation. These proceedings, most notably the Commission's pending investigation of the purchasing practices of Appellant, Transco, are likely to conflict directly with state ratable take orders.

In Opinion Nos. 204 and 204-A, *Columbia Gas Transmission Corporation*, Docket Nos. TA81-1-21, *et al.*, 26 FERC ¶ 61,034 (January 16, 1984) and 26 FERC ¶ 61,334 (March 16, 1984), *appeal docketed, Office of the Consumers' Counsel, State of Ohio v. FERC*, No. 84-1099 *et al.* (D.C. Cir.), the Commission recently reaffirmed its commitment to regulating interstate gas pipelines. These proceedings involved an investigation of the purchasing practices of Columbia Gas Transmission Corporation (Columbia) under both the NGPA Section 601(c)(2) "fraud or abuse" standard and the more expansive NGA Sections 4 and 5 "just and reasonable" standard, commonly referred to as a standard of prudence.[5] As a preliminary issue, the Commission affirmed the determination of the Administrative Law Judge (ALJ) that the NGPA " 'does not remove the Commission's authority to examine contracts and practices and provide for appropriate relief when such contracts or practices are found to be unjust, unreasonable, unduly discriminatory or preferential.' " 26 FERC at 61,096. The Commission then concluded, *inter alia*, that "Columbia's gas acquisition

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[5] Prior to the NGPA's passage, a pipeline's ability to pass through the cost of gas to its distributor-customers was a function of the Commission's determination of the justness and reasonableness of the proposed rates. Because the NGPA replaced the Commission's authority to determine wellhead prices as to certain gas with statutory "maximum lawful prices," the Commission was directed to deny passthrough of the wellhead cost of gas only where it "determines that the amount paid [by the pipeline] was excessive due to fraud, abuse or similar grounds." 15 U.S.C. § 3431(c)(2). The other aspects of a pipeline's purchasing practices remain subject to the prudence standard.

practises are imprudent and unjust and unreasonable under NGA Section 5." 26 FERC at 61,112. Specifically with regard to the take or pay provisions in Columbia's gas supply contracts, the Commission found that, "while the take or pay provisions were not unreasonable when entered into, the effect of these provisions under present conditions is unjust, unreasonable, unduly discriminatory and preferential." *Id.* at 61,120. The Commission explained that the pipeline's take or pay situation

> is harmful to Columbia's customers who stand to lose markets because of fuel switching and unfair to consumers who must bear the cost. It is discriminatory to low-cost producers whose production is cut back. It is potentially harmful to Columbia itself.

Id. It is evident, from this example of the FERC's exercise of its NGA authority, that a pipeline's purchases in conformity with state ratable take schemes—potentially resulting in increased costs for the pipeline and its customers—could very well be deemed imprudent under federal standards and, therefore, unlawful.

While the FERC is currently conducting a series of inquiries into the purchasing practices of various interstate pipelines,[6] the most obvious—and imminent—possi-

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[6] *See Panhandle Eastern Pipe Line Company*, Docket No. TA84-1-28-002, Order Establishing Hearing Procedures, 26 FERC ¶ 61,339 (March 16, 1984); *El Paso Natural Gas Company*, Docket No. RP82-33 *et al.*, Order on Rehearing Modifying Prior Orders, Consolidating Cases, and Setting Hearing, 26 FERC ¶ 61,366 (March 21, 1984); *MIGC, Inc.*, Docket No. RP84-15-000, Order Accepting Filing, Consolidating Proceedings and Setting Matters for Hearing, 26 FERC ¶ 61,369 (March 21, 1984); *Trunkline Gas Company*, Docket No. TA83-1-30-002 *et al.*, Order Setting Matter for Hearing and Consolidating Proceedings, 26 FERC ¶ 61,363 (March 21, 1984); *Southern Natural Gas Company*, Docket No. TA84-1-7-000 *et al.*, Order Consolidating Proceedings and Setting Matters for Hearing, 26 FERC ¶ 61,371 (March 21, 1984); *Transcontinental Gas Pipe Line Corp.*, Docket No. TA83-2-29-001 *et al.*, Order Estab-

bility of collision with Mississippi's enforcement of its ratable take order involves the pending FERC investigation into the purchasing practices of Appellant, Transco.

On September 28, 1984, Transco initiated a Purchased Gas Adjustment proceeding at the Commission seeking, among other things, an increase in rates filed in its FERC Gas Tariff. *Transcontinental Gas Pipe Line Corporation*, Docket Nos. TA85-1-29-000 and TA85-1-29-001. On October 12, 1984, AGD filed a Motion to Intervene and Protest in this proceeding, asserting that Transco has not demonstrated the justness and reasonableness of its proposed rate increase. AGD also raised several important issues with regard to the purchasing practices of Transco. Specifically, AGD's motion stated that:

> AGD is aware that certain of Transco's gas supply agreements contain high percentage take-or-pay provisions substantially identical to those contracts found "unjust and unreasonable" by the Commission's Opinion No. 204. AGD is particularly interested in the manner in which higher-priced contracts with high percentage take-or-pay provisions have affected, and will continue to affect, Transco's purchasing practices and cost of gas supply. Similarly, AGD is aware that Transco's November 1984-April 1985 purchase pattern will be influenced by a ruling of the Mississippi Oil & Gas Board in which Transco is required

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lishing Hearing Procedures on Deferred Purchasing Practices Issues, 26 FERC ¶ 61,361 (March 21, 1984).

While no pending case has been found to illustrate the point, it is also possible that FERC action pursuant to Section 7 of the NGA could create a collision with a state ratable take statute such as the one at bar. FERC's general jurisdiction to regulate the transportation of natural gas in interstate commerce (NGA Section 1) is accompanied by the power to *condition* certificates (issued under NGA Section 7) authorizing interstate pipelines to construct and operate gas transportation facilities. *See Maryland People's Counsel v. FERC*, No. 84-1090, slip op. at 20 n.19 (D.C. Cir. May 10, 1985).

> to accept deliveries on a "ratable take" basis from certain Mississippi supply sources. It is not clear that this pattern of Mississippi purchases satisfies the just and reasonable standard applicable to Transco's purchase pattern under Sections 4 and 5 of the Natural Gas Act nor is it clear that pro rata purchases of decontrolled wellhead purchases are consistent with the lowest reasonable cost standard.

Motion of AGD to Intervene and Protest at 7.

In its "Order Accepting and Suspending Proposed Tariff Sheets Subject to Refund and Conditions," issued in the Transco PGA proceeding, 29 FERC ¶ 61,148 (October 31, 1984), the Commission responded to AGD's concerns by ordering a public hearing "concerning the lawfulness of Transco's proposed rates, *including purchasing practices issues.*" *Id.* at 61,321-22 (emphasis added). This order was clarified in its "Order Accepting and Suspending Proposed Tariff Sheets Subject to Refund and Conditions, Setting Matters for Hearing, and Consolidating Dockets," 31 FERC ¶ 61,129 (April 30, 1984), where the Commission explicitly acknowledged AGD's arguments. It stated that the "purchasing practices" issues set for hearing included the allegations that "Transco's prospective purchasing patterns may be adversely influenced by 'ratable take' orders of the Mississippi Oil and Gas Board" and that "certain court orders pertaining to the rights of producers may be thwarting a least cost purchasing strategy and are in violation of [the FERC's] 'exclusive jurisdiction' over purchases of gas by Transco." *Id.* at ——, mimeo at 8-9.

If, after the public hearing and investigation, the Commission finds that Transco's compliance with the Mississippi ratable take order is unjust and unreasonable,[7] the

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[7] It is conceivable that the FERC will rule that Transco's purchases of Mississippi gas were inconsistent with its duty to acquire gas at the lowest reasonable cost and that its purchase pattern should be adjusted to exclude some portion of the Mississippi pro-

pipeline will be in the position of necessarily violating either state or federal law. The FERC would have authority, furthermore, under NGA Sections 4 and 5 to order Transco to adhere in the future to a pattern of gas acquisition which is inconsistent with the state ratable take scheme. As this Court reiterated in the post-NGPA *Maryland v. Louisiana* case, "[t]he FERC need not adjust its ruling to accommodate" the state statute. 451 U.S. at 725. Moreover, the case law clearly directs that in a situation of actual federal-state conflict, where "compliance with both federal and state regulations is a physical impossibility," the Supremacy Clause requires the state law to fall to the federal law. *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 204 (1983), citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

Importantly, the doctrine of federal preemption does not apply only in cases of actual conflict between state and federal law. The attempted state regulation must fall in a situation where, "[a]t the very least, there is an imminent possibility of collision." *Maryland v. Louisiana*, 451 U.S. at 725, citing *Northern Natural*, 372 U.S. at 92. Given the "imminent possibility" of a FERC order directing Transco to correct its purchasing practices in a manner inconsistent with the Mississippi ratable take scheme, this state regulation is preempted.

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duction required to be taken under that State's Oil & Gas Board's order. *See Columbia Gas Transmission Corp., supra*, where the Commission resolved to "take action to ensure that Columbia corrects its gas acquisition practices." 26 FERC at 61,112.

II. THE REGULATION OF INTERSTATE PIPELINES IS PARTICULARLY LIKELY TO AFFECT NATIONAL ENERGY INTERESTS, AND THEREFORE REQUIRES A UNIFORM, COMPREHENSIVE SCHEME OF FEDERAL REGULATION.

A. State By State Regulation Of Pipeline Purchasing Practices Will Impose Substantial Burdens Upon The Interstate Gas Market.

A system of divergent, perhaps conflicting state regulations of pipeline purchasing practices would place enormous burdens on all segments of the interstate gas market. State "ratable take" regulation, therefore, stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), evidenced in its enactment of a comprehensive federal statutory scheme, under both the NGA and the NGPA, for the regulation of interstate gas pipelines.

The Mississippi Supreme Court's statement that the "only burden" created by Statewide Rule 48 is a burden upon Transco and not pipelines generally, as well as the entire interstate market for natural gas, 457 So.2d at 1323, is a gross understatement. Even discounting the increased gas costs incurred through take or pay exposure in Transco's contracts, the fact remains that Transco and all other interstate pipelines which purchase gas in Mississippi are burdened with the responsibility of altering their purchasing patterns to comply with the ratable take order. These pipelines henceforth must take their gas supplies ratably from every producer who owns an interest in a "common source of supply." In some cases, this could result in forced purchases from large numbers of non-contracting parties.[8]

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[8] The Mississippi court itself admitted concern about the fact that it did not know exactly how many wells (in addition to the six named) were producing from the Harper Sand Gas Pool. Lacking this information, the court stated that "[s]hould there be other

This administrative burden is one of potentially enormous proportions. Quite apart from Mississippi, major gas producing states such as Louisiana and Texas have ratable take statutes which could become enforceable against interstate pipeline companies. If the Mississippi law is upheld here, compliance with several state ratable take statutes—each having important *differences*—may in fact be an impossibility. For example, the Texas ratable take statute provides that a pipeline "common purchaser" must take gas "without discrimination in favor of one producer or person against another producer or person in the same field and *without unjust or unreasonable discrimination between fields in this state.*" TEX. NAT. RES. CODE ANN. §§ 111.083, 111.086 (Vernon 1978). (Emphasis added).[9] Under the Mississippi court's rationale, even the Kansas ratable take statute invalidated by this Court in *Northern Natural* would have to be upheld today as applied to first sales of NGPA deregulated gas. That statute forced pipelines to take ratably on a statewide basis.[10] As the Court

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producers or owners . . . they will have to make that fact known to the appropriate tribunal before they may be afforded any relief." 457 So.2d at 1327 n.13.

[9] *See also* OKLA. STAT. ANN. tit. 52, § 823 (West 1969):

> [every pipeline which is engaged in the business of purchasing natural gas] shall purchase all the natural gas in the vicinity of, or which may be reasonably reached by its pipe lines, or gathering branches, without discrimination in favor of one producer or one person as against another, . . .

LA. REV. STAT. ANN. § 30:42 (West 1975):

> every person engaged in the business of purchasing and selling natural gas in this state . . . shall purchase all of the natural gas which may be offered for sale which may be brought in pipes and connecting lines . . . without discrimination in favor of one producer against another, or in favor of any one source of supply as against another save as authorized by the commissioner. . . . If a person is unable to purchase all the gas offered, then he shall purchase natural gas from each producer ratably . . .

[10] *See* 372 U.S. at 88.

noted in *Northern Natural*, these orders "shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the state . . . a task which would otherwise presumably be the State Commission's." 372 U.S. at 92. The implementation of diverse state regulations such as these would impose tremendous administrative burdens on all pipelines forced to comply with them while at the same time satisfying their responsibilities under federal regulation. The resultant costs, of course, would ultimately fall upon consumers.

Complex and conflicting state by state regulation of pipeline purchasing practices, furthermore, would put impossible burdens on the FERC's ability to carry out its regulatory mandate. In a closely analogous case, this Court struck down a local airport anti-noise ordinance on federal preemption grounds. The Court noted, *inter alia*, that if other localities followed with ordinances of their own, "it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air flow." *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 639 (1973). Likewise, with conflicting state demands on a pipeline's gas acquisition practices, the Commission would be unable to undertake any meaningful supervision of pipeline purchasing practices, as it is statutorily bound to do.

B. The Growth Of Divergent State Regulation Of Pipeline Purchasing Practices Will Have Unjust And Oppressive Consequences For The Nation's Gas Consumers.

As mandated by the Natural Gas Act, the fundamental responsibility of the FERC is to protect the nation's gas consuming public against excessive rates and charges and to set policies which provide natural gas "at the lowest reasonable rate consistent with the maintenance of adequate service." *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959). *See generally, Maryland v. Louisiana, supra*, 451 U.S. at

747-48, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610-12 (1944). This protection is exactly what would be lost if the states were permitted to enter individually into the field of interstate pipeline regulation.

The Mississippi Supreme Court itself recognized the problem for consumers and described it thus:

> Transco has the right to pass the costs it incurs in purchasing natural gas through to the consumer. 15 U.S.C. § 3431(c). In this sense, it is not Transco who experiences a burden, it is the consumer. If higher purchasing prices at the wellhead lead to higher prices to the consumer and a loss of markets, this is simply one inevitable consequence of the free market policies of the era of deregulation with respect to which Transco is vested by the negative Commerce Clause with no right to complain.

Transcontinental Gas Pipe Line Corporation, 457 So.2d at 1322. What the court neglected to address, however, is the absence of any recourse to out-of-state consumers burdened with the additional costs resulting from state ratable take orders. It is well settled that state regulatory agencies such as the Mississippi Oil & Gas Board are "obliged to regulate in the State, not the national interest." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 633 (1972). As appellant noted in its Jurisdictional Statement, the Mississippi Oil & Gas Board expressly refused to consider evidence submitted on the interstate impact of its action. J.S. at 17. Furthermore, this Court has acknowledged the "unavoidable conflict between producing States and consuming States." *Louisiana Power & Light*, 406 U.S. at 633-34. *See also Public Service Commission of Kentucky v. FERC*, 610 F.2d 439, 443 (6th Cir. 1979). *See generally, Pennsylvania v. West Virginia*, 262 U.S. 553 (1922). Thus, the states can not and will not consider national needs in their regulation of interstate gas pipelines.

This Court stated recently that

> the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by States can patently interfere with broader national interests.

Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 377 (1983). With the continued market dominance of interstate pipelines, *see Maryland People's Counsel v. FERC*, No. 84-1090, slip op. at 13-17 (D.C. Cir. May 10, 1985), and the continued need for federal protection of consumers against unfair and excessive rates, the federal interest is clear. It must be assumed to preclude enforcement of state laws regulating the same activity that Congress made the subject of federal regulation.

CONCLUSION

For the foregoing reasons, AGD respectfully requests this Court to reverse the decision below of the Mississippi Supreme Court, and find that the State of Mississippi's attempt to regulate the purchasing practices of an interstate natural gas pipeline is a violation of the doctrine of federal preemption under the Supremacy Clause of the Constitution.

Respectfully submitted,

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